LITERATURE AND LEGAL DISCOURSE

Equity and Ethics from Sterne to Conrad

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CHAPTER I

Introduction

Use every man after his desert,
And who should 'scape whipping?
Shakespeare, *Hamlet*

Art about ethnicity or race, about class, about gender and sexuality – in short, art that reflects, transforms, or engenders the shifting phantom of human identity – has been advanced by many as the crucial work for our time. The sixties and seventies saw the collapse of an organic historicism which considered important those works of art that embodied the contradictions of the cultures in which they were embedded. The eighties saw the decline of the "theory canon" in humanities and art departments, due to its failure to construct a rationale especially for literary curricula. Contemporary criticism in the nineties has so far been focusing on the various relations between dominant components of cultures. Among those components, literature and art are now considered to play an even more marginal role than they used to.

At the same time, critics have shifted their attention toward the phenomenon of marginalization as such. Never have so many assumed that the "othering" of minorities is an important factor in fashioning dominant or mainstream modes of culture. "Othering" in advanced industrial cultures, it is frequently argued, generally takes on more sophisticated forms than oppression and exclusion. An increased degree of inclusion, resulting from the accelerated processes of modernization, has paradoxically made it even harder for minority groups to authenticate the articulation of disadvantages by means of complaint, appeal, or resistance.[1]

Over almost a decade, the most committed proponents of cultural criticism in advanced industrial societies have therefore been investigating such links between inclusion and marginalization. These days, the networking structures of global communication often serve as ambiguous

signs and symptoms of the nature of those links. Interactivity is currently being assessed in contradictory ways, sometimes in terms of a radically participatory democracy that enables postmodern and postcolonial subject constitution through the mechanism of interactivity, sometimes in terms of a covertly neocolonialist buyout of environmental globalism.[2] As a result, criticism in the nineties has been dominated by attempts to illuminate, and articulate possibilities for, the notion of the marginal.

THE MARGINAL

Minority literature, however, represents only one single instance of what the constraints and possibilities of marginality can mean for literature.[3] The marginality of modern literature in general emerges from its relation to socially more relevant ways of organizing and transforming knowledge. This type of marginality can be said to derive from the fast-changing conditions of literature's inclusion in modern cultural processes, rather than its exclusion from them. Barbara Herrnstein Smith identified the reasons for these shifting grounds of inclusion with a crucial feature of modernity as such: the "contingencies of value."[4] In this view, the production of literary texts in the modern period must be seen as competing, if not complicitous with more general parameters of production: the varying dynamics between use value and exchange value.

Multicultural criticism has frequently drawn on this link between, on the one hand, the seemingly total commensurability of value and, on the other, the seemingly total commensurability of signification in modern Western cultures. If virtually every value seems exchangeable with another, does the same hold true for linguistic signs as well? If so, standard separations between durability and transience are no longer as universal as they seemed. The numerous arguments made about this link are generally concerned with two related questions: first, whether the notion of contingencies in terms of value and signification leaves remainders which may resist absorption into total commensurability; and second, whether the very desire for such remainders to be generated in response to a modern experience of total commensurability is a key feature of modernity itself.

Similarly, practitioners of the literary, supported by modernist and poststructuralist theorists, have insisted that making claims for literature's oppositionality need not interfere with the necessity to ditch

universalisms. Significantly, this tendency seems to persist, despite the very dehistoricization and nostalgic appropriations of the institution "literature," especially on the part of the New Critics, that along with other factors triggered the multiculturalist turn against literature's dehistoricization in the first place. More importantly, it still seems possible today to advocate multiculturalism and at the same time not to restrict literature's marginality to the critical vocabulary associated with the role of minority literature.[5] Postmodern literature is usually said to have inaugurated, or at least enhanced, the very collapse of "high"–"low" distinctions that made multiculturalist approaches to the literary possible. Similarly, modern literature – no matter whether considered established or not – may be equally far from being stripped of the potential to collapse, if only for brief intervals, unexamined distinctions between the "hegemonic" and the "nonhegemonic."[6] The notion of "literariness" has rightfully come to be considered a theoretical fetishism of sorts. Yet the possibility remains that the literary has meaningful existence, within the multicultural frame of reference, as a marginal discourse. As such, it may well exceed those definitions of "literature" which are currently being proposed on the basis of unequivocally "nonhegemonic" criteria.

Prominent multiculturalist critics such as Judith Butler, John Guillory, and Homi Bhabha tend to use examples from literature to illustrate and privilege various remainders – gender, class, and ethnicity, respectively[7] – to modernity's total commensurability of signification. They formulate these remainders in terms of critical practices, each serving to emphasize and foster a culture's "differences within." Despite their different approaches, all three see literature embedded in cultures, both according to a logic of "supplements" and a deconstructive view on ethics: The opposition between the particularity of literary "textures" and a culture's more general "textuality," of which literature forms part, must be seen as one of mutually dependent (rather than merely contradictory) identities; and these identities are always also defined by the remainders of what each identity is not.[8] Butler, Guillory, and Bhabha would readily acknowledge the difficulty that their goal of maintaining arenas of genuine political contestation may be implicated in the power relations within which norms of modernization, history, law, and civil society are reinforced over time. Notwithstanding this acknowledgment, they continue to insist on a certain distinctness of the "hegemonic." For only then can they declare their critical practices political alternatives, or "supplements," to dominant ideas of distribu-

tive and compensatory justice. Only then can they have "counterhegemonic discourse" emerge as an irreducibly supplementary function of modernity.

One unintended effect of such an approach is that the supplementary quality claimed for literature may have to be subjected to whatever "counterhegemonic" criteria current discourses on "supplements" introduce into arenas of political contestation. This effect is particularly dangerous if merely created to convert the increasing social marginality of literary study and literary criticism today – especially when compared to the role of mass media – into an occasion, predominantly inside the professional domain, to declare political expression criticism's cutting edge. To be sure, the rise of political expression in recent criticism – especially in certain versions of neopragmatism, new historicism, gender and postcolonial studies – has exposed many aspects of modern art as both an expression of and an appeal to the language, assumptions and favored mythologies of patriarchy, as well as the ethnocentrism of the high merchant classes. But literature's relation to a more general cultural "textuality," in which it participates, cannot be reduced, as for instance the neopragmatist Walter Benn Michaels believes, to just being part of it.[9] The way a culture produces discourses and has them circulate may inform, but need not necessarily govern literary discourse. This ambiguity explains why one cannot easily dismiss canonical modern literature of the West merely because its creation is now (correctly) being seen as tinged with something immoral, disloyal, and exploitative of intimacies and experience.

Clearly, the supplementary quality, not only of modern literature in general, but also of the various corrective devices already built into norms of modernization, law, and civil society, is nowadays itself traded as a complex object of political contestation. One example is the argument between Michael Walzer, who sees distributive justice as largely based upon the political communities which practice it,[10] and Seyla Benhabib, who claims that contemporary feminism's need to insist on notions of agency is largely incompatible with such communitarian pluralisms.[11] Given this situation, to insist on a distinctness of the "hegemonic" may not be all that difficult if one is dealing, for instance, with modernity's "shift to the postcolonial site."[12] If applied to rereading canonical texts, however, those texts will then have to be declared complicitous with "hegemonic discourse" to the extent that canonized texts do not always allow for nonstereotyped identities to emerge from the margins of culture.

This is an undesirable, because potentially reductive, effect. One way to avoid it is to examine literature's supplementary quality more specifically in relation to nonliterary manifestations of "supplements." One such manifestation, which proves especially useful in examining the problem of inclusion and marginalization, is the relation of equity to the letter of the law.

THE EQUITABLE

Equity is known as a maxim applied and instituted in the majority of Western legal systems. Aristotle first formulated it as a correlative, in the context of Greek tragedy, to the consideration of mitigating (or sometimes exacerbating) circumstances that connect criminal action with tragic error. As a mode of justice, Aristotle's notion of equity sometimes contravenes the letter of the law, or its rhetoric, especially where the law does not honor considerations of character, as in the case of Antigone, or special circumstances, as in the case of Oedipus. Both the letter of the law and equity supplement the law's "spirit," or the legislator's general intentions in creating a specific law. The sense of equity as a corrective can thus potentially blur clear-cut distinctions between "intention" and "letter." Equity may supplement the letter of the law in order to ensure that a given interpretation of the "letter" will express the "spirit" of the law. But equity may also supplement the "spirit" of the law, or even the very supplementary relation between "letter" and "spirit," in order to underscore a more fundamental mismatch between "letter" and "spirit."

It seems not entirely wrong, while certainly a gross oversimplification, to say that lawyers and legal theorists tend to deal with the first option – a rule-bound jurisprudence of equity – and literary practioners with the second – a less formal, more allusive supplementary notion of equity. But the question as to whether equity does or does not "belong" to the law is not just an institutional one. The answer also depends on whether equity is associated with something general, such as a universal rational order of justice, or something particular, such as the judicial discretion to interpret the law according to rules and precedents that can change over time. Similarly, it depends on whether the law is associated with something general, such as the predictability and security of rules, or something particular, such as the alterability and flexibility of rules and precedents over time. Thus, what is general about equity is its concern with what is universal; what is particular, its concern with what is

flexible. Conversely, what is general about the law is its concern with what is predictable; what is particular, its concern with what is posited. Different conflicts between the general and the particular may emerge, therefore, depending on whether equity is or is not considered part of the law. If it is part of the law, then the security, validity, and accessibility of rules may conflict with the potential unpredictability, arbitrariness, and privacy of judicial discretion. If not, then different aspects of judicial discretion, such as a judge's "genius" or "paternalism," may conflict with non-judicial forms of discretion, such as the readiness of individual conscience to ascribe or accept guilt.

My point here is not to compile a taxonomy of supplementary relations between law and equity in terms of the general and the particular. Rather, I want to connect them with the various supplementary relations between dominant and marginal discourse, official and unofficial stories, or included and excluded voices, that I discussed earlier. The complexities are similar and thus invite careful comparison. Let me suggest just a few cases in point. Literary discourse today may be marginal compared to other forms of organized knowledge. But not all literature is equally marginal. Excluded as well as included texts can represent degrees of marginality. Similarly, literary rhetoric is sometimes described as less instrumental, and perhaps more concerned with universal matters, than nonliterary, for instance legal, rhetoric. But not all literature represents the same values to all human beings. Literary as well as nonliterary rhetoric grows out of a particular place and time. Literature may therefore not provide minorities with an absolute sense of justice, nor represent an openendedness of justice as inequities committed by the law's exclusions. But the fact that it grows out of a particular place and time, and that the truths it might reveal to some are not necessarily self-evident, does also not deny it a significant supplementary relation to the law.

For Aristotle, equity was a means of adjusting universalist human assumptions in legislation and legal practice to a cosmic order of justice.[13] He considered the "poetic fictions" of Athenian tragedy an appropriate means ("mimesis") toward that end. For him, the "particular," incomplete, and nonabsolute quality of justice and injustice[14] that tragedy helped to express also shaped the function of narrative in the Athenian courts. To enhance public debate in the community, it was not enough to use such narratives simply to appeal, by means of persuasion, to the moral quality of certain rules or opinions. For rules and opinions were human-made, and as such fallible. Sometimes, the

appeal to a universal, rational order of justice was needed. To the extent that "poetic" fictions (tragedies) performed such an appeal, they could then be considered an "equitable" form of legal fiction: they would be used to create a plot whose truth about human action is self-evident. When such an act of *mimesis* was successful, however, those fictions would also indicate the very limitations of public rhetoric, or persuasion, in creating justice.[15] But in the early modern period, that sense of a universal order of justice suffered a gradual demise. Eventually, the "equitable" Aristotelian unity of "poetic" and legal fictions fell apart as well. The traditional function of Aristotelian *mimesis* shifted towards that of representing, enacting, and supplementing the complex networks of institutions, practices, and beliefs that constituted Renaissance culture as a whole.[16]

This shift also caused a disjunction of equity and legal fictions. It contributed to the widespread modern complaint that legal fictions may be used to feign equitability in order to cover up abuses of judicial discretion. For after the Aristotelian system of rhetoric, ethics, and *poiesis* had fallen apart, neither law nor literature could confidently claim any longer to be able to contain a comprehensively equitable function of fictions. Both discourses, however, adjusted to the widening gulf between equity and legal fictions. In British common law, an institutional separation of common-law and equity courts was intensified which had been in place ever since equitable jurisdiction was associated with the authority of the Crown; it lasted until late into the nineteenth century.

> The Lord Chancellors, originally clerics (such as Thomas à Becket and Cardinal Wolsey), dispensed justice according to conscience rather than strict legal forms. Later the rules and remedies of equity jurisprudence [. . .] were institutionalized in the Court of Chancery. [. . .] Equity started out as a truly discretionary jurisdiction. This proved intolerable, and rules of equity emerged; nevertheless equity procedure remained relatively formless, and the result eventually was tremendous delays and uncertainty.[17]

Shakespeare examined some of the "para-legal" consequences generated by the disjunction of equity and legal fictions. Luke Wilson demonstrates how the literary fiction of Ophelia's suicide in *Hamlet* and the contemporary common-law fiction of suicide in terms of "self-felony" (*felo de se*) mutually affected one another. The literary fiction of the gravedigger who declares Ophelia's self-defense a self-offense (V, i, 9) translated "with a twist [. . .] already anticipated in the legal text[s]" the legal fiction's explanation of self-defense as suicide. Wilson argues that in early modern England, rhetorical institutions as different as law and

theater began to "implement" metaphors into one another's discourses; and that instead of adjusting human to divine justice, this "alignment between two implementations of metaphor" reveals how the law came to take part in the shaping of modern subjectivities by way of manipulating expectations toward culpability.[18]

Enlightenment thinkers frequently associated equity, somewhat in the spirit of Aristotle, with a rational use of critique that operates above and beyond the logic of precedents. They did so in order to develop reliable means of questioning – questioning the foundations of those long-standing assumptions which had been used to legitimize exclusionary practices. But towards the end of the nineteenth century, science came to replace right reason, and moral philosophy, as a safeguard against improper uses of rhetoric. Equity became absorbed into law, and its authority dissociated from aristocratic privilege, essentially for purposes of egalitarian reform. Law should still serve the public interest, but only by balancing competing interests, not by imposing social unity from above. Along with the demise of Enlightenment attempts to ground the rationality of critique in an authority "that would remedy injustices committed by positive law," equity was eventually stripped of the institutional sense of authority traditionally associated with British equity courts.[19] Equity's function has since shifted, rather than declined, toward that of a temporary remainder to the internal differentiations of norms which prevail in dominant political and legal systems.[20]

THE UNPARALLELED

Unlike equity, literary fiction has continued to be a contested (if increasingly marginal) institution. Nonetheless, its sometimes "wayward and unsatisfactory" encounters with the difference between equitability and commensurability in matters of justice are still most accurately described as "a supplement and a corrective to any legal or philosophical propositions."[21] Nowhere are these "wayward and unsatisfactory" encounters more prominent than in the dubious event of reading literary complaints. Such complaints may be articulated in first-person, third-person, or other voices. But the singularity of suffered injustices that a writer sometimes seeks to convey, perhaps in order to make its articulation exemplary for more universal statements, is most likely to be presented as an intensity vociferous, muffled, or stifled, of first-hand suffering. As a shared practice between the sufferer of injustices and the uninjured reader, the articulation of a complaint has a chance of

affecting the sufferer's relation to the reader and the world. Both can feel encouraged that the future may be tied to an unsettled issue in the past, an issue reminiscent of a singular event of emergency, and no precedent in support of memory's abstractions from the singular.

As a challenge to interpretation, the articulation of a complaint presupposes a sufferer's code that needs to be cleared by a reader. Displacing the experience of suffering injustice to the experience of reading complaints, the sufferer implies that some form of redemption may be achieved as soon as readers are substituted for victims and particulars erased in favor of universals. In the final analysis, however, there will be no easy and clear-cut distinctions between complaints as shared practices and challenges to interpretation. Once complaints are articulated, they are also likely to cross established lines between intimate one-to-one exchanges and the redemptive forgetfulness of such exchanges in exemplary spectacles. Which at once raises serious questions about the kind of supplementary role literature may be able to play in relation to the law.

To study legal and literary notions of complaint as related forms of appeal is to address two questions currently raised in cultural criticism: first, whether there are, or can be, adequate languages to articulate unparalleled experiences of marginalization; and second, whether literature's marginal status is or is not overrated as an illustration of how modernity's forms of "othering" work according to a logic of "supplements." On the one hand, civil society's arguably most dominant narrative – that of the many repeated tensions and transitions between law and equity – reflects a sense of iterability with which norms may be reformulated as alternatives. At first sight, this sense of iterability seems not unrelated to the one claimed in multiculturalist attacks on "hegemonic discourse" for freezing a culture's "differences within." On the other hand, legal practice frequently normed, and institutionalized, this kind of iterability in order to engender centered (if not generic) types of subjectivity, instead of encouraging the latter's emergence from the margins of culture.

In short, the potential relations between the general and the particular have neither always nor entirely replicated themselves in the potential relations between the dominant and the marginal. On the one hand, literature's supplementary relation to dominant discourses may help to articulate equity's supplementary function, for instance where the letter of the law is silent on particulars. It may also help to expose failures of that same function, for instance where the entire supplementary relation

of equity to the law was found corrupt. On the other hand, while courts of appeal can perform other than equitable functions, and as such draw institutional criticism, they nonetheless continue to be acknowledged as rule-governed forums for political contestation. This somewhat paradoxical fact, however, does not necessarily, as a certain number of multiculturalist critics would argue, make literature irrelevant to pointing out modernity's limits with respect to ideals of distributive and compensatory justice. Instead, it rather strikingly resembles another fact, namely that the supplementary function of literature with respect to dominant discourses continues to be used for purposes of exploring the possibilities contained in rhetorical institutions such as appeal, complaint, and call for retribution.

This particular employment of literature seems still desirable. Today, however, few would deny that once we define its marginality by a logic of "supplements," we will also have to reject the traditional assumption that poetic justice may somehow supplement specific shortcomings of distributive and compensatory justice, such as potentially corrupt institutional relationships between law and equity. Deconstructionist legal scholars tried to shift this problematic to the level of textuality.[22] In doing so, they usually see literary texts in a more privileged position than other kinds of texts to articulate the potential inconsequentiality of an appeal as the openendedness of justice. Conversely, they assume that the law tends to obscure that openendedness as its practitioners "normalize" textuality in universal rules for how to link precedents with principles.

The deconstructionist insistence on an openended notion of justice is certainly effective in challenging the ways the law "normalizes" textuality in the positivist terms of legal textuality. One influential example of how this assumption was successfully applied in cultural criticism is Henry Louis Gates's *The Signifying Monkey*, a study on the trickster in African-American literary experience, whose compelling ability to signify and redescribe can escape the kinds of rhetorical and ideological closure associated with the dominant society. In order to achieve such results, however, critics are forced, as it were, permanently to emphasize the artificiality of those voices which articulate injustices. For they must deconstruct any sense of closure that may adhere to the ways in which singular voices insert their complaints into a logic of competition with official or dominant languages of appeal or retribution.

While such projects are successful in opening up that kind of closure, they can at times also reduce the very openendedness of making complaints to a language of comfort. The problem with languages of

comfort is that they themselves end up normalizing the singularity of suffered injustice in the name of a deconstruction of genuine agency. To "do justice" to the diversity of relations between the openendedness of justice and the singularity of agency in the modern period, a greater variety of contexts is needed for the literary analysis of gender, class, and ethnicity. I use sentimentality, utility, philanthropy, and solidarity as historical names for those contexts, but do not consider their "history" one of modernity's "grand narratives." The chief purpose of applying this method to selected literary authors is to sort out, in historical sequence, the possible connections between two different trajectories that marginal, equitable, and unparalleled modes of agency could (and can) follow. In the final analysis, it is to illustrate cross-overs between law and literature in more differentiated terms than "counterhegemonic" opposition.

Sterne challenges sentimentalism's assumption that the natural basis of sentiments is autonomous from the artificiality of legal devices. In *Tristram Shandy* and *A Sentimental Journey*, he indicates that that assumption is as problematic as the common-law assumption that the transmission of customs in communities is autonomous from any consideration *not* based on reason. The masculine gaze that defines relationships between sufferers and spectators of suffering on the scene of sympathy appears to change according to different kinds of national law. In contrast, it is precisely the differences between French and English law, ironically, that Uncle Toby's and Yorick's transnational gestures of sympathy on French territory were supposed to transcend. At Sterne's literary interface of law and compassion, the shaky foundations of natural sentiment "supplement" certain problematic natural-law assumptions, in the eighteenth century, about the moral nature of human beings.

To illustrate this point from a nonliterary perspective, and to provide a transition to the nineteenth century, I include a chapter on Bentham's legal discussion of utility, utilitarian conscience, and the ambiguity of fictions. In the wake of Bentham, then, Dickens cross-examines benevolence and welfare. He challenges philanthropy's emphasis on a religious notion of responsibility, which is supposed to compete with contemporary legal measures of generating and protecting welfare. In *Bleak House*, he indicates that that notion is complicitous with the law's efforts to normalize misery by classifying the liabilities for its persistence. For what defines philanthropy's competitive relation to the law is its basic assumption that in order to efficiently alleviate misery, the sentimental

scene of spectators and sufferers has to be institutionalized, just as the law institutionalizes changing rights, duties, and obligations. At Dickens's literary interface of responsibility and liability, the institutional foundations of philanthropic compassion "supplement" the impact of Bentham's legal positivism, in the nineteenth century, on the felt need to control the alterability of the law.

Conrad challenges notions of solidarity that are meant to counteract official modes of identification, especially contemporary aspirations to national or racial identity. In *The Nigger of the "Narcissus,"* he indicates that such a nonofficial notion of solidarity may be an alternative to the way official jurisdiction encourages identification. But solidarity also replicates the very mechanism of authority and subversion that its appeal to commonality sought to debunk in the first place. For what defines the need to anchor alternatives in nostalgia is the assumption that solidarity will *subvert* modern cycles of empowerment and resentment. Conrad establishes a literary interface between solidarity's nostalgic standards for the inclusion of marginalized voices and the judicial authority to determine and control the admissibility of evidence concerning marginalization. He examines certain uses of solidarity that are supposed to set human relationships apart from modern struggles for recognition. It turns out that these uses of solidarity "supplement" legal formalism's assumption, which increasingly informed adjudication toward the end of the nineteenth century, that juridical processes should be autonomous from social and political processes.

THE SOCIAL NATURE OF BONDING

In the light of recent discussions about the kinds of interactivity among virtual communities on the Internet, as well as possible copyright conflicts emerging from that type of communication, critics have also been emphasizing the imaginary components of "pre-virtual" communities of the modern period. For instance, the eighteenth-century foundation of literary authorship in the right to own one's own voice was related to the legal concept of a rights-bearing individual who can own property.[23] In such discussions, there is usually agreement to the extent that while kinship, residence, and legal system were factors in determining such communities in terms of the nation, identification of individuals or groups was never natural. Instead, it was largely dependent on how pre-electronic media, for instance legal and literary texts, disseminated

the sign of the nation and contributed to positioning the citizen-subject in relation to it.[24]

One much-debated point, however, is whether the legal narrative of the modern period enhanced or obfuscated the political process in which communities are constructed. Were such dominant narratives efficient in allowing dispersed and fragmented individuals to coexist by virtue of the very existence they have "in common"? Or did they use essentialist notions of the nation to reduce multiplicity to fixity and thus effect a "closure of the political"?[25] Current work in the field of trauma studies raises a related question: How do narratives mediate between incoherent experiences and the difficulty of assimilating past to present?[26] Such considerations reflect an interdisciplinary awareness that examining connections between the national past and the present involves questions of organizing narrative.

The organization of narrative through text and interpretation is clearly something law and literature have in common. However, interdisciplinary projects in legal and literary studies are far from agreeing on the relevance of such commonalities. Much less is there any interdisciplinary consensus, especially not in recent years, on whether it is the approximation or the distance between law and literature that ought to be emphasized. On the one hand, there are academic lawyers who remain confident that both fields can learn from one another.[27] On the other hand, literary critics and legal scholars continue to disagree on questions concerning the law's legitimacy. For instance, neopragmatist critic Stanley Fish doubts that the political attacks on the law's autonomy launched by the Critical Legal Studies movement of the seventies and eighties[28] are an acceptable response to those questions.[29] In contrast, deconstructionist legal scholars frequently associate those kinds of responses with a crisis in the law's very ethical foundations.[30] Conversely, economist legal scholar Richard Posner contrasts the instrumentality of legal rhetoric with the noninstrumentality, indeed the inconsequentiality, of literary rhetoric. He continues to feel justified in seeing the cross-overs of literary studies into legal studies as the former discipline's attempt to conceal and displace the loss of its own foundations.[31]

Neopragmatist critics typically deny such a differentiation, generally maintaining that each of those two rhetorics defines interpretive communities according to their cultural, social, or political preconceptions.[32] But while neopragmatists share the relativist assumptions of deconstructionists, they would not necessarily agree with them that literature remains a viable instrument for legal critique. Most liberal

humanists, however, want to reserve and uphold just such an option, while they would agree with neopragmatists that both legal and literary rhetorics can define interpretive communities performatively.[33] Against the skeptical claims of their deconstructionist critics, liberal humanists and feminist critics continue to describe beneficial interactions, both historical and speculative, between judicial authority and literature, seeing both as performances of a communal rhetoric open to many voices, and in this sense capable of moral progress.[34]

There are of course many ways – and the ones listed above are far from exhausting the full spectrum – of looking at this particular debate about problematic closures of the political in legal and literary formations of communities. The one I want to suggest is to introduce the possibility of different types of social bonding, relative to those more strictly defined by power struggles and political contestation. To be sure, no type of social bonding is beyond the demands to be nourished and to protect. Both demands require the human need for comfort to be complemented by the desire for another's desiring gaze. But perhaps types of bonding can exist that reach beyond those conflictual human relationships which typically reduce the desiring gaze, first, to the paradoxical demands for recognition from rivals, and second, the paradoxical frustration of desire by virtue of the very realization of its specific demands. Emmanuel Levinas challenged the idea, commonly dated back to Hobbes, that an individual's rights of liberty precede a citizen-subject's obligations reciprocally to honor trust and act justly.[35] Indirectly reformulating the goals of Rousseau's and Adam Smith's projects for postmodern contexts, he proposed to link the notions of rights and responsibilities in a concept of primary sociality, which defines communities by the nonreciprocal recognition of individual voices.

It certainly remains an open question whether Levinas's project can successfully reach beyond the kind of political contestation which is usually involved in competing for recognition. He does succeed, however, in calling attention to a fundamentally social nature of bonding, and what impact that idea may have particularly on those types of bonding whose parties are related no less by affection than by competition. As one consequence, an individual's actions can be considered as strengthened and credited by a community not merely in being seen, or in being part of its spectacles and "the gaze of the other," but also and more importantly in being valued and revalued through their impact on other persons. The conditions and outcomes of those actions create

relationships which also modify the value of all the elements to those relationships.

Not all of those relationships, however, are affect-based or guided by nonreciprocal principles of ethical action. Moreover, some of them are more norm-governed than others, especially so in the domain of modern kinship and collective affiliation, where the law, among other institutions, is in charge of stabilizing the referent of property by regulating its proper usage. The law usually also defines rules as to which type of bonding can embody a community's mutual production of value and benefit as a fixed term. But revaluation of human relationships can happen "in the eyes" of the community or interlocked communities. The institutional balance (or imbalance) between the "letter" and "spirit" of the law then operates as an external evaluator.

Alternatively, revaluation of human relationships can happen "in the eyes" of conscience, an internal censor or jury employed to deal with instabilities in the relation between identity and community. If conscience is invoked or its "call" heard, it operates to resolve the conflicts that arise from insisting on the importance of being able to respect oneself as a person only when one binds oneself to an internal constraint against doing harm to another. The legal concept of equity was designed to supplement the original intentions of legislators and judges. Conscience's private space of jurisdiction is indebted to, while acting upon, the public sphere of law and equity.

Conscience may be "used" to undo the force of the law and its promise to gain a purchase on identity, especially where the law compels the individual to become a subject under the terms of dominant discourse. But sometimes this equitable function of conscience shifts toward a more general function: the permanent readiness to accept guilt. In such cases, conscience may well turn out to be complicitous with those social norms which encourage submission to the law. On the one hand, conscience's internal censorship can effectively complement the activity of external censors. On the other hand, the law may present itself to the individual as desirable insofar as it promises to compensate, by conferring upon him or her an identity as citizen-subject, for conscience's permanent readiness to accept guilt.

VALUING CLAIMS TO RECOGNITION

Any negotiation between those two sides which does not instantly privilege the appeal to precedent, law, and cause at the expense of an

unparalleled experience of marginalization requires that its representations, usually supported by languages of comfort, will not reduce that experience to conformity with an established rule. The call of conscience may assemble, when its voice hails the citizen-subject, both unparalleled and precedented forms of injury-as-injustice. Therefore, conscience can be considered an ambiguous negotiator between the compulsion to articulate the singular and the substitution of that compulsion by means of advocating the nonsingular.

Conscience does not exhaust itself simply in using the voice that it helps to articulate to mount a justification of an excessively singular experience, gathered at the limit of where languages of comfort can reach. For in the case of such a type of justification, it would be merely instrumental in restoring the primacy of norms, whether enforced by the law or other institutions of power. This view would in fact correspond to Michel Foucault's position that on the postmonarchic scene of modernity, norms become the condition for discourses that make generalizations about unprecedented and unparalleled events. Foucault's position seems convincing only to the extent that it can explain the transition modern law made from presumed essentialisms like the social contract to the self-referential "sovereignty" of norms, which gradually began to define modern communities' observations of themselves.[36]

But conscience cannot be entirely discredited as a mechanism that submits constitutions, codes, and laws to common standards, which then form the normative basis for judgment. The reason is that conscience may also sustain the excess of singularity to a point where its activity will dislodge comforters from the position of judges and arbiters to that of singular complainants. Such substitutions are primarily neither amiable nor social in their effect unless they freeze into the detached indulgence of socially legitimate feeling, such as sentimental pity, philanthropic compassion, and enthusiastic solidarity. Therefore, conscience can be said to operate, with respect to the articulation of marginal voices, along and across the limit of singular complaints. Its ambiguous or liminal quality enables conscience continuously, though not necessarily consistently, to put a challenge to the ways dominant languages of mutual benefit administer singular experiences of marginalization, that is to say, how those languages operate by virtue of their indifference to everything they do not already include. To be sure, conscience may always become defunct in the absence of specific boundaries that it is permitted to cross. But it may also help to articulate marginal voices to the extent that the resentment which fuels that

articulation can give recognition a cultural range that it would otherwise lack.

The distinction between external and internal revaluations of relationships is, however, clearly a heuristic one.[37] To make such distinctions in terms of law versus equity, on the one hand, and justificatory versus singularizing conscience, on the other, means to be already implicated in the respective assumptions that underlie concepts of equity or conscience. In fact, the importance of equity's supplementary relation to the law changed considerably throughout the modern period. British common law can serve as the prime illustration of that change. The institution of equity courts was flourishing when legal theory and practice were still informed by natural-law assumptions about human nature. It declined in what is called the formalist period of the mid-to-late-nineteenth century when legal theory and practice came to be based more strictly on principles and precedents, rather than policy considerations.[38]

Similarly, the importance that Hobbes conceded to conscience after the civil war underwent considerable changes in later centuries, both in support of and in opposition to the law. These can be traced from the emergent need during the eighteenth century to repoliticize morality, for which purpose Enlightenment thinkers employed the authority of conscience, to the disparaging connotations with which Nietzsche, D. H. Lawrence, and Henry Miller dismissed that authority as an self-consumption of the will, resulting as they believed from the failed promises that the internalization of guilt creates. Thus, instead of artificially separating external from internal revaluations of human relationships, it seems more appropriate to open up historical perspectives on the various spaces that politics and law left conscience to operate in.[39]

Therefore, I want to argue that equity and conscience negotiated, under the conditions of modernity, the question of marginality as a question of access to recognition. To open up historical perspectives on that negotiation is to examine how revaluations of social bonding came to be seen as a central issue of modern political life. Appeals to law and equity are certainly part of the law's normative and cognitive strategies for assigning value to persons. At the same time, to value claims to recognition is also to go beyond measuring injustices distributively in terms of physical injury and reputational harm. Appeals that encourage, or are encouraged by, a call of conscience suggest at the least a possibility of withdrawal – at the interface of conflicting normative, cognitive,

and affective orientations – from those processes of revaluation which external supervisory institutions hold out as promises.

Three historical perspectives that allow the revaluation of human relationships to be modelled as a particular feature of modernity are sentimentality, philanthropy, and solidarity. In systematic terms, all three reflect to varying degrees the impact of conscience's internal censorship on social bonding. In historical terms, they are contexts in which Sterne, Dickens, and Conrad shaped modern novels to compare and contrast the supplementary relation of literary language to more dominant languages with that of equity to the letter and spirit of the law. Their different objectives may be defined, in the case of sentimentality, as the promise to unfold the moral foundations of human nature; in the case of philanthropy, as the project of linking benevolence with beneficence; and in the case of solidarity, as a nostalgic projection of commonality that does not need a common enemy. Sterne, Dickens, and Conrad turn sentimentality, philanthropy, and solidarity into sites, as I demonstrate, on which to examine an interaction between certain legal and literary languages. This observation does not imply, however, that the sites themselves go unexamined in the process. Instead, they are also indebted to the legal assumptions to which they serve to generate alternatives. The chapter on Bentham illustrates this point from a nonliterary perspective.

Neopragmatist and new historicist approaches to such a reciprocal model of modernity generally investigate, despite all their differences and internal varieties, the historical instances of how languages such as those of sentiment, utility, philanthropy, and solidarity can become sites for the production and circulation of other languages (and vice versa). These approaches have so far provided a variety of useful analyses on which interactions between law and literature may be modelled. Their disadvantage is that they often describe such interactions as being simply mimetic of, and on those grounds complicitous with, modernity's general mode of production and circulation of goods.[40] This is a view which may well deny literature the possibilities embedded in Butler's, Guillory's, and Bhabha's claims about political performativity.

In contrast, it is the performative aspect of legal and literary languages that should become the focus of comparison. The differences literature can make certainly exist within the same cultural framework that allows modernity's circulation of discourses to appropriate the very making of differences. The differences themselves, however, do not simply reflect an economy based on turning sexual, class, and ethnic

difference into moral or metaphysical difference. Instead, I focus on how Sterne, Dickens, and Conrad connect different revaluations of human relationships with one another. My readings are strategically motivated by the attempt to see the complexities of literary texts in excess of the disparaging connotations of their complicities. In the final analysis, I argue that literature of the modern period could indeed affect, in constructive and occasionally successful ways, certain conditions of marginality.